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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RONALD SCOTT REED, Defendant and Appellant.	E043843 (Super.Ct.No. RIF127534) O P I N I O N

APPEAL from the Superior Court of Riverside County. Douglas E. Weathers, Judge. Affirmed.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Pamela Ratner Sobeck and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Ronald Reed was convicted of: (1) possession of methamphetamine for sale; (2) transportation of methamphetamine; (3) being a felon in unlawful possession of a handgun; and (4) being an active member of a criminal street gang. In addition, a street gang enhancement was found true. Defendant was sentenced to an aggregate prison term of 20 years 4 months. On appeal, he makes two contentions, both of which are unpersuasive.

Defendant first argues that the trial court committed reversible error in not instructing the jury on the elements of simple possession, a lesser included offense of possession for sale. We disagree. While the court did not instruct on the *elements* of simple possession, per se, it did instruct the jury that simple possession was a lesser included offense of possession for sale. Additionally, it provided verdict forms to the jury showing simple possession as a lesser included offense of possession for sale. Lastly, we do not believe there was substantial evidence that defendant was guilty of simple possession and not possession for sale.

Secondly, defendant contends he was deprived of due process, in that the court denied his posttrial request for trial transcripts relative to making a motion for new trial based on ineffectiveness of trial counsel. Again, we disagree. Prior to sentencing, defendant discharged his retained attorney. The public defender's office substituted in. Counsel requested trial transcripts in order to assist in the filing of a motion for new trial.

The trial court, in properly refusing to order the transcripts, found that counsel had not demonstrated a necessity for the transcripts.

We affirm the judgment of conviction.

II. STATEMENT OF FACTS

On December 13, 2005 defendant Ronald Reed, while driving his vehicle, was stopped by officers of the Riverside Police Department because his rear license plate was not visible. As Officer Joseph Flores and his trainee, Officer Jeffrey Acosta, approached the car from the rear, Officer Flores noticed defendant shifting back and forth in his seat with his hands down around his waist. After multiple commands for defendant to place his hands on the steering wheel, he finally complied. The two officers then approached the vehicle.

Officer Flores asked defendant to produce a driver's license, which defendant was unable to do. Officer Flores then had defendant step out of the car, where a cursory safety patdown search was conducted. Defendant was then placed in the back of the police car, at which time he informed the officers that he was on parole. Based on that information, Officer Acosta performed a parole search of defendant's car. The search produced a clear plastic baggie which contained a white substance, a digital scale, a "pay-owe" sheet, and a radiofrequency scanner.

Upon observing these items, Officer Flores returned to the patrol car to conduct a more thorough patdown search of defendant. As defendant was stepping out of the car, Officer Flores noticed two plastic baggies lying on the floorboard near defendant's feet.

A third officer, Officer Terry Ellefson, who came to the scene to provide backup, then performed a more thorough search of defendant.

During the search, Officer Ellefson, while moving his right hand up defendant's inner leg, felt a suspicious lump protruding from his buttock. Upon contact, the lump made a "crunchy sound," which alerted Officer Ellefson that it might be contraband. Officer Ellefson used his forefinger and thumb to pull the lump rearward, which caused a clear plastic baggie to fall from defendant's left pant leg.

The baggie obtained from defendant's pants contained a substance which Officer Ellefson believed to be methamphetamine. The substance was tested by way of a NIK field test, and it came back as positive for methamphetamine. Gina Williams, a senior criminalist at the California Department of Justice, testified that the weight of that baggie totaled 16.12 grams.

Furthermore, Detective Jeff Spencer testified that the total weight of all of the baggies confiscated amounted to approximately one ounce. Detective Spencer opined that a person possessing one ounce of methamphetamine would likely be a low to midlevel dealer. Based on this information, combined with the fact that defendant had $300 in cash on him, the detective decided to further investigate the matter by searching defendant's residence for possible additional evidence.

Multiple residences associated with defendant were searched. The search of one of the residences yielded a digital scale, a large quantity of plastic baggies (some with suspected methamphetamine residue), and a handgun. At another residence detectives

connected defendant with gang paraphernalia and a "pay-owe" sheet. When asked in a hypothetical what all of this evidence suggested, Detective Spencer testified that the methamphetamine was possessed for the purpose of sale.

At trial, defendant's defense was that none of the drugs belonged to him.

III. ANALYSIS

A. *There Was No Reversible Error in Failing to Instruct on the Elements of Simple Possession, a Lesser Included Offense of Possession for Sale*

The trial court instructed the jury on possession for sale with Judicial Council of California Criminal Jury Instructions, CALCRIM No. 2302. It did not instruct on the *elements* of simple possession, a lesser included offense. The trial court did however instruct the jury that simple possession is a lesser included offense of possession for sale, and that if the jury could not unanimously agree that defendant was guilty of possession for sale, it could convict him of the lesser crime of simple possession. In addition, the jurors received verdict forms reflecting simple possession as a lesser included offense of possession for sale. Defendant contends it was error for the trial court to fail to instruct on the elements of the lesser included offense of simple possession.

"[I]n a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v.*] *Watson* [(1956) 46 Cal.2d 818]." (*People v. Breverman* (1998) 19 Cal.4th 142, 178.) Under that standard, a conviction can only be reversed if, after the court reviews the entire cause and evidence,

it finds that it is reasonably probable that a more favorable outcome would have resulted for defendant without the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

In this case, it is not reasonably probable that defendant would have received a more favorable outcome with a jury instruction on the elements of simple possession. "Jurors are presumed to be intelligent persons capable of understanding and correlating jury instructions." (*People v. Tatman* (1993) 20 Cal.App.4th 1, 11.) The jurors were given an instruction for possession for sale[1] which includes all of the elements for simple possession.[2] (*People v. Montero* (2007) 155 Cal.App.4th 1170, 1175-1176.) The jurors were told that simple possession was a lesser included offense of possession for sale and that if they did not feel that defendant was guilty of the greater charge they could find him guilty of the lesser. Further, the jurors received verdict forms for possession for sale as well as simple possession as a lesser included offense. In addition, the prosecutor, during closing argument, explained that simple possession is always included with

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[1] Possession for sale elements are: "1. The defendant possessed a controlled substance; [¶] 2. The defendant knew of its presence; [¶] 3. The defendant knew of the substance's nature or character as a controlled substance; [¶] 4. When the defendant possessed the controlled substance, he intended to sell it; [¶] 5. The controlled substance was Methamphetamine; [¶] AND [¶] 6. The controlled substance was in a usable amount." (CALCRIM No. 2302.)

[2] Simple possession elements are: "1. The defendant [unlawfully] possessed a controlled substance; [¶] 2. The defendant knew of its presence; [¶] 3. The defendant knew of the substance's nature or character as a controlled substance; [¶] 4. The controlled substance was [methamphetamine]; [¶] AND [¶] 5. The controlled substance was in a usable amount." (CALCRIM No. 2304.)

possession for sale, and then stated that "the jury has the option of saying . . . he possessed it, but I don't think he possessed it to sell it."

Any reasonable jury would deduce that simple possession consisted of all of the elements of possession for sale except for the element of intent to sell. This, in conjunction with the court's instructions, the verdict forms, and the prosecutor's argument, lead to the inescapable conclusion that it is not reasonably probable that defendant would have received a more favorable outcome had the jury been specifically instructed on the elements of simple possession. Thus, to the extent that error occurred in not more fully instructing, it is harmless.

Defendant also argues that the trial court erred in its instructions by telling the jury that possession for sale is a general intent crime. If a jury is incorrectly instructed as to the level of intent, but is provided with the correct substantive instruction defining the elements, then the error can be deemed harmless. (*People v. Lyons* (1991) 235 Cal.App.3d 1456, 1463 (*Lyons*).) Defendant concedes this point.

In *Lyons*, the defendant sent a letter to his accuser in an attempt to dissuade his accuser from testifying. (*Lyons, supra,* 235 Cal.App.3d at p. 1459.) At trial, the court erroneously instructed the jury that the intent required for the crime was general intent rather than specific intent. (*Id.* at pp. 1459-1460.) In finding the error harmless, the appellate court pointed out that the jury was further instructed that the offense required a showing of an attempt to dissuade the accuser from testifying. (*Id.* at p. 1462.) "Thus the application of the general intent instruction . . . accomplished nothing more than to

emphasize the specific intent required of the offense," that being the intent to dissuade. (*Id.* at p. 1463.)

Here, just as in *Lyons*, the crime of possession for sale was improperly given the label of general intent, but was followed up with an instruction that intent to sell was a required element. Thus, when read together, the jury was instructed that defendant had to willfully possess the drugs with the "intent to sell." By the very nature of these two instructions, the jury found that defendant had the specific intent to sell. The failure to specifically instruct on specific intent was harmless.

Furthermore, and as suggested by the People, there was no substantial evidence to warrant instructing the jury on the lesser included offense of simple possession. A trial court has a sua sponte duty to instruct on a lesser included offense when such offense is supported by substantial evidence. "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed." (*People v. Breverman, supra*, 19 Cal.4th at p. 162.) Here, the record lacks evidence to support the giving of the lesser included offense.

The evidence demonstrated that the amount of methamphetamine in defendant's possession, combined with other drug-related materials, was indicative of possession for

sale. Found in defendant's car was a clear plastic baggie which contained a white substance, a digital scale, a "pay-owe" sheet, and a radiofrequency scanner. As defendant was stepping out of the patrol car, Officer Flores noticed two more plastic baggies lying on the floorboard near defendant's feet. In addition, a clear plastic baggie fell from defendant's left pant leg while at the scene of his arrest. The total weight of all of the baggies confiscated amounted to approximately one ounce. Detective Spencer opined that a person possessing one ounce of methamphetamine would likely be a low to midlevel dealer. All of this evidence, combined with the fact that defendant had $300 in cash on him, that in two of the searched residences were a digital scale, a large quantity of plastic baggies (some with suspected methamphetamine residue), and a "pay-owe" sheet, leave no doubt that the drugs were possessed solely for sale. Even the evidence adduced by defendant did not go to the issue of simple possession, but rather that the drugs did not belong to him.

B. *Defendant's Due Process Was Not Violated By the Trial Court's Refusal to Order Trial Transcripts for Purposes of Facilitating a Motion for New Trial Based on Ineffective Assistance of Counsel*

Before defendant was to be sentenced, he substituted out his retained trial counsel and requested that a public defender be appointed. The public defender made a request for trial transcripts because she believed, from talking with defendant, that there were potential grounds for a motion for new trial based on ineffectiveness of trial counsel. The public defender stated that there were potential witnesses and exhibits not introduced, as

well as facts which suggested that a motion to suppress should have been made. Counsel asserted that she needed a copy of the trial transcripts to determine if defendant's trial counsel was competent. The court did not order the transcripts, but provided counsel with three weeks to prepare a motion for new trial. A subsequent request for the trial transcripts was denied and the court proceeded with sentencing.

An indigent defendant only has a right to a trial transcript when one is necessary for effective representation. "[S]ince a motion for a new trial is an integral part of the trial itself, a full reporter's transcript must be furnished . . . whenever necessary for effective representation by counsel at that important stage of the proceeding." (*People v. Lopez* (1969) 1 Cal.App.3d 78, 83.) The *Lopez* court further stated that, since there are no mechanical tests for determining if a denial of a trial transcript violates a defendant's due process rights or right to effective representation, each case must be examined on its own facts. (*Ibid*.) Since *Lopez*, California courts have pointed out that federal courts have used two factors in determining "need": "'(1) the value of the transcript to the defendant in connection with the [proceeding] for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript.'" (*People v. Hosner* (1975) 15 Cal.3d 60, 64-65; *People v. Bizieff* (1991) 226 Cal.App.3d 1689, 1699-1700.)

Here, defense counsel attempted to justify her need for the trial transcripts on the bases that: (1) trial counsel did not have a list of witnesses that were provided to him and no witnesses were called at trial; (2) he did not produce exhibits at trial which were in his

possession; (3) he did not look to see whether an expert witness would have been appropriate with regard to the gang allegations; (4) he did no investigation; and (5) he did not raise a potentially valid Penal Code section 1538.5 motion.[3] In attempting to support her motion for the trial transcript, counsel indicated: "I understand some of these things that [defendant] has addressed would probably require written affidavits along with the motion, but at this point in time, without being trial counsel it makes it very difficult for me to give the Court specific factors which I would argue as ineffective assistance of counsel." In addition, counsel indicated: "I did speak with [trial counsel] in regards to the witnesses, but from what [defendant] tells me, versus what [trial counsel] tells me, they are conflicting as to the witnesses that should have been called."

Initially, none of counsel's proffered reasons point to anything that can only be found in the trial transcripts. The trial court reiterated this point by stating that "the Court . . . has never been given any factual basis upon which [it] could determine that there was in fact a theory presented to the Court, at least for a new trial, of an evidentiary nature . . . ." In fact, all of the above matters, relative to trial counsel's alleged ineffectiveness, could be gathered by speaking with trial counsel and defendant.[4]

Secondly, even with conflicting stories from trial counsel and defendant, receipt of the trial transcripts would not resolve the conflict. The conflict between the two was

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[3] Trial counsel in fact did make a motion to suppress, which was denied.

[4] From the record it does not appear that trial counsel was the least bit reticent relative to providing information for purposes of the motion.

never elaborated upon, and there is no offer as to how the transcripts would resolve the conflict. The trial transcripts would have provided no further assistance because the witnesses or exhibits in question were never introduced; ergo, there was nothing in the record.

Defendant has simply failed to demonstrate a need for the transcripts.[5]

IV. DISPOSITION

The judgment is affirmed.

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/s/ King
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Miller
J.

[5] It also must be noted that for purposes of the appeal defendant's counsel has a copy of the transcripts, yet raises no issue based on the transcripts of ineffectiveness of counsel.